

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs February 2, 2006 Session

**L.D.N., ET AL. v. R.B.W, ET AL.**

**Appeal from the Chancery Court for Bledsoe County  
No. 2848     Jeffrey F. Stewart, Chancellor**

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**No. E2005-02057-COA-R3-PT - FILED FEBRUARY 17, 2006**

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This appeal involves a petition to terminate the parental rights of K.W. (“Mother”) to her two minor sons. The petition was filed by K.W.’s parents, L.D.N. and M.B.N., who also sought to adopt their two grandsons. Following a trial, the Trial Court found and held that Mother had abandoned her two sons, that her parental rights should be terminated, and that Petitioners should be allowed to adopt the two minor children. Because the state of the record prevents this Court’s effective review of the Trial Court’s judgment, the judgment of the Trial Court terminating Mother’s parental rights and granting the petition for adoption is vacated, and this case is remanded for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Keith H. Grant, Pikeville, Tennessee, for the Appellant K.W.

Carol Ann Barron, Dayton, Tennessee, for the Appellees L.D.N. and M.B.N.

## OPINION

### Background

Mother's two sons are seven and ten years old. The petitioners are K.W.'s parents, L.D.N. and M.B.N. ("Petitioners"). In October of 2003, Petitioners filed suit seeking to have Mother's parental rights to her two sons terminated and, thereafter, to adopt the children.<sup>1</sup> When the petition was filed, Petitioners already had physical custody of the children which they had obtained in March of 2003 after filing a petition for temporary emergency custody "due to the living conditions and health concerns of the children." As grounds for terminating Mother's parental rights, Petitioners alleged: (1) Mother had abandoned the children by willfully failing to visit them or by engaging only in token visitation for more than four consecutive months immediately preceding the filing of the petition; (2) Mother had abandoned the children by willfully failing to support the children for more than four consecutive months immediately preceding the filing of the petition; (3) the children were dependent and neglected and Mother had made no reasonable effort to provide a suitable home for the children and it was unlikely that she would do so; (4) the children had been removed from Mother's home for more than six months by order of the court and the conditions which led to their removal still persisted; and (5) continuation of the parent-child relationship would greatly diminish the children's chances of an early integration into a stable and permanent home. Petitioners also alleged that it was in the best interest of the children for Mother's parental rights to be terminated.

Following the trial, the Trial Court entered an order terminating Mother's parental rights. According to the Trial Court:

[T]he Court finds by clear and convincing evidence that ... [Mother] has abandoned the subject children in that ... [Mother has] willfully failed to visit (or to engage in more than a token visitation) for more than four (4) consecutive months next preceding the filing of the petition and that ... [Mother has] abandoned the subject children in that ... [Mother has] willfully failed to support or make reasonable payments toward the support of the children for four (4) consecutive months immediately preceding the filing of the petition ....

After terminating Mother's parental rights, the Trial Court granted Petitioner's request to adopt the minor children.

Mother appeals claiming there was insufficient evidence presented to the Trial Court to conclude that she had abandoned the children either by willfully failing to visit the children or by willfully failing to provide support for a period of four consecutive months immediately preceding

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<sup>1</sup> Petitioners also sought to terminate the parental rights of the children's biological father, R.B.W. While the Trial Court also terminated R.B.W.'s parental rights, R.B.W. did not appeal from that order.

the filing of the petition. Mother also claims the Trial Court erred by failing to enter specific findings of fact and conclusions of law prior to terminating her parental rights.

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). In *In re Adoption of T.A.M.*, No. M2003-02247-COA-R3-PT, 2004 WL 1085228 (Tenn. Ct. App. May 12, 2004), *no appl. perm. appeal filed*, this Court observed that:

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 546; *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at \*5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).

*In re Adoption of T.A.M.*, 2004 WL 1085228, at \*3 (footnote omitted).

In *Dep't of Children's Servs. v. D.G.S.L.*, this Court discussed the relevant burden of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that “parents have a fundamental right to the care, custody, and control of their children.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). “However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)....

*Dep't of Children's Servs. v. D.G.S.L.*, No. E2001-00742-COA-R3-JV, 2001 WL 1660838, at \*6 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. appeal filed*.

Returning to the present case, this Court has not been provided a transcript from the hearing where at least six witnesses testified. A Statement of the Evidence has been provided, but this document is only two full pages in length. The Statement of the Evidence is quite sparse concerning Mother's visitation with her children. For example, the testimony of Petitioner M.B.N. reveals that Mother "came to visit occasionally on Saturdays and/or Sundays." During these visits Mother would talk to the children and help give them baths. M.B.N. acknowledged that she and Mother often argued and it was for this reason that Mother claims she did not visit the children more often. Mother's sister testified that Mother would visit her children two to three times a month, but did not interact with them as much as the sister thought she should. One of Mother's brother's testimony was summarized in its entirety as follows:

[M.N., Mother's] brother, testified that he lived near his parents and visited with them every other Sunday. He testified that [Mother] did visit with her children at her parents' home.

Another brother also testified that Mother visited with her children at Petitioners' home.

With regard to Mother's claimed abandonment for failing to support the children, the testimony is even more sparse. M.B.N. testified that on one occasion Mother gave her \$60 toward the support of the children. However, Mother testified that she has been unemployed for some time, that she suffered severe medical ailments including occasional seizures, and that these ailments often precluded her from working.

The Trial Court terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(1) after concluding she had abandoned the children as defined in Tenn. Code Ann. 36-1-102(1)(A)(i). Abandonment is defined in this statutory subsection as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(i).

When determining if Mother abandoned the children pursuant to the relevant statutory definition, the pertinent time frame is the four month period immediately preceding the filing of the petition. The Statement of the Evidence makes no reference whatsoever to any specific time frame. We cannot ascertain whether Mother visited the children during this critical four month period. All we are able to determine is that Mother did visit the children at some time, but the visitations were not as often or as meaningful as some of her family members would have liked. The same can be said for Mother's alleged abandonment based on lack of support. We know Mother paid at least \$60, but we do not know when the payment occurred. We also know that Mother testified to health problems that she claimed prevented her from working and which, if true, could impact on whether she can be deemed to have "willfully" failed to provide support. The Statement of the Evidence contains no testimony to rebut Mother's assertions regarding her physical health. In short, even if we accept every assertion in the Statement of Evidence as being true, we cannot determine whether or not Mother actually abandoned the children as that term is defined in the relevant statute.

The lack of any evidence in the record on appeal is further compounded by the fact that the Trial Court failed to make specific findings of fact and conclusions of law as required by Tenn. Code Ann. § 36-1-113(k).<sup>2</sup> Simply stating that Mother had abandoned the children is insufficient. In the recent case of *M.D. v. R.L.H.*, No. E2005-00324-COA-R3-PT, 2005 WL 3115874 (Tenn. Ct. App. Nov. 22, 2005), *no appl. perm. appeal filed*, this Court stated:

In cases involving termination of parental rights, Tenn. Code Ann. § 36-1- 113(k) requires a trial court to enter an order making "specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing." This requirement facilitates "appellate review and promote[s] just and speedy resolution of

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<sup>2</sup> Tenn. Code Ann. § 36-1-113(k) requires a trial court to "enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing."

appeals. When a lower court has failed to comply with Tenn. Code Ann. § 36-1-113(k), the appellate courts must remand the case with directions to prepare the required findings of fact and conclusions of law." *In re M.J.B. & M.W.S., Jr.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004) (citations omitted).

*M.D. v. R.L.H.*, 2005 WL 3115874, at \* 3.

Equally as problematic as the lack of specific findings of fact and conclusions of law is the absence of any determination by the Trial Court that it was in the best interest of the children for Mother's parental rights to be terminated. In *M.D. v. R.L.H.*, *supra*, we vacated an order terminating a father's parental rights because the order lacked this necessary finding. Specifically, we stated that "[l]acking this necessary finding, we must vacate the Trial Court's judgment terminating Father's parental rights and remand this case to the Juvenile Court for detailed findings of fact and conclusions of law on whether terminating Father's parental rights is in the child's best interest." *M.D. v. R.L.H.*, 2005 WL 3115874, at \* 4.<sup>3</sup>

The case of *In re: Adoption of J.D.W.*, No. M2000-00151-COA-R3-CV, 2000 WL 1156628 (Tenn. Ct. App. Aug. 16, 2000), *no appl. perm. appeal filed*, also merits discussion. In *J.D.W.*, the Middle Section of this Court stopped just short of holding that a Statement of the Evidence never will be sufficient for proper appellate review in a parental rights termination case and that a transcript always must be provided. We, likewise, decline to hold that a Statement of the Evidence never will be sufficient. However, a parental rights termination case where a Statement of the Evidence would be sufficient would be extremely rare and the best way to proceed is by providing this Court with a complete transcript of all evidence. Having said that, we also note that Mother in the present case was declared indigent and counsel was provided. If Mother remains indigent on remand, then we direct the Trial Court to the following holding from *J.D.W.*:

[W]e hold that, in cases involving the termination of parental rights, a record of the proceeding of sufficient completeness to permit proper appellate consideration of the parent's claims must be made in order to preserve that parent's right to an effective appeal. If the parent whose rights are to be terminated is indigent, then the trial court must ensure that such a record is created and made available to a parent who seeks to appeal. Because the trial record does not constitute a record of sufficient completeness for appellate review, we vacate the orders terminating the father's parental rights and granting the subsequent adoption and remand this case to the trial court for a new trial on this matter. The trial court shall determine the father's

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<sup>3</sup> After terminating Mother's parental rights the Trial Court did find that allowing Petitioners to adopt the children was in the children's best interest. This finding, however, is not equivalent to a finding that terminating Mother's parental rights was in the best interests of the children.

indigency, and if the father is indigent, the trial court shall ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards.

*J.D.W.*, 2000 WL 1156628, at \* 4 (footnote omitted). The *J.D.W.* Court further explained that the State must provide a transcript for an indigent parent even in cases when the petition to terminate parental rights is filed by a private party. *Id.* at n.5.

In summary, we hold that in the absence of a transcript and in light of the altogether inadequate Statement of the Evidence provided to us on appeal, we are unable to conduct an effective review of the Trial Court's judgment terminating Mother's parental rights. This judgment must, therefore, be vacated. On remand, the Trial Court is instructed to make detailed findings of fact and conclusions of law regarding whether there are grounds for terminating Mother's parental rights. If grounds are proven by clear and convincing evidence, then the Trial Court must make detailed findings of fact and conclusions of law regarding whether there is clear and convincing evidence proving that it is in the children's best interest for Mother's parental rights to be terminated. Finally, if another appeal then is taken, this Court must be provided with a record of sufficient completeness to allow us to undertake an appropriate review of all of the evidence presented to the Trial Court.

### **Conclusion**

The judgment of the Trial Court terminating Mother's parental right and granting the petition for adoption is vacated, and this case is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellees, L.D.N. and M.B.N.

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D. MICHAEL SWINEY, JUDGE